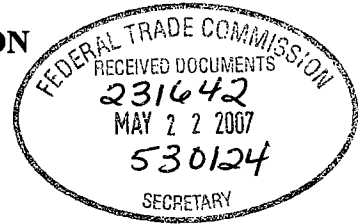


ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

REALCOMP II LTD.,

a corporation.

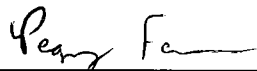
Docket No. 9320

Public

**COMPLAINT COUNSEL'S MOTION IN LIMINE REQUESTING AN
ORDER TO PRECLUDE LAY OPINION TESTIMONY REGARDING
CERTAIN HYPOTHETICAL LEGAL ISSUES**

Respondent Realcomp II Ltd. ("Realcomp") has proffered Karen Kage, Robert Taylor, Douglas Hardy and Douglas Whitehouse to testify to, among other areas, the hypothetical application of contract law to certain disputes between brokers, without adequate foundation or qualifications as an expert in legal issues. Complaint Counsel respectfully submits this Motion *in limine* to preclude Ms. Kage, Mr. Taylor, Mr. Hardy, Mr. Whitehouse, and any other Respondent witnesses, from testifying as to lay opinions, either live or by deposition, for the justification of the Realcomp Policies regarding the possible outcome of a procuring cause dispute under an Exclusive Agency contract, or any other opinions as to which they do not have personal knowledge or are not qualified as experts in legal issues.

Respectfully Submitted,



Sean P. Gates

Peggy Bayer Femenella

Joel Christie

Linda Holleran

Christopher Renner

Counsel Supporting the Complaint

Bureau of Competition

Federal Trade Commission

Washington, D.C. 20580

(202) 326-3711

Facsimile (202) 326-3496

Dated: May 18, 2007

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of
REALCOMP II LTD.,
a corporation.

Docket No. 9320

Public

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION IN LIMINE
REQUESTING AN ORDER TO PRECLUDE LAY OPINION TESTIMONY
REGARDING CERTAIN HYPOTHETICAL LEGAL ISSUES**

Sean Gates
Peggy Bayer Femenella
Joel Christie
Linda Holleran
Christopher Renner

Counsel Supporting the Complaint

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Complaint Counsel respectfully submit this memorandum of law in support of their Motion *in limine* for an Order precluding the introduction by Respondent Realcomp II Ltd. (“Realcomp” or “Respondent”) of deposition or trial testimony by certain lay witnesses relating to the application of contract law to certain hypothetical disputes between brokers. Such testimony, purportedly providing a justification for Realcomp’s Website and Search Function Policies (together, the “Policies”), would be without adequate factual foundation or qualification of the witnesses as experts in legal issues.

I. INTRODUCTION AND BACKGROUND

Respondent filed its Preliminary Witness List and Expert Witness List on January 26, 2007, and its Deposition Designations and Final Proposed Witness List on May 15, 2007. These filings make it clear that Respondent intends to defend the Policies by introducing testimony of certain of its fact witnesses regarding the application of contract law to certain hypothetical disputes between brokers.

Realcomp seeks to offer testimony regarding the application of legal principles to a hypothetical dispute involving a listing broker that uses an Exclusive Agency¹ contract and a cooperating broker that procures a buyer for the property.² The hypothetical dispute arises if the

¹ An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but also reserves to the property owner or principal a right to sell the property without assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold. Answer at ¶ 9.

In contrast, an Exclusive Right to Sell Listing is the traditional listing agreement, under which the property owner appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, and agrees to pay the listing broker a commission when the property is sold, whether by the efforts of the broker, the owner or another broker. Answer at ¶ 8.

² Realcomp Final Proposed Witness List at 3-4; [REDACTED]; Taylor Dep. at 92:4-92:8.

buyer of the property closes the sale without involving the cooperating broker. Such a situation, Realcomp argues, could conceivably give rise to an arbitration dispute concerning whether the cooperating broker was the “procuring cause” for the sale, and therefore entitled to receive a commission. Realcomp seeks to offer testimony from its “fact” witnesses that under this hypothetical, and using their view of the law, the listing broker would be excused from paying the offer of compensation to the cooperating broker if the listing broker did not receive a commission. Realcomp apparently offers this hypothetical result as justification for its Policies disfavoring Exclusive Agency listings.

Specifically, Respondent listed Karen Kage, Douglas Whitehouse, Douglas Hardy, and Robert Taylor as “fact” witnesses. Realcomp’s Final Proposed Witness List (“Witness List”) at 1-4. Realcomp’s filings show that it seeks to offer opinion testimony of these witnesses regarding a hypothetical legal problem that it claims justifies the Policies:

- Mr. Taylor may “offer testimony concerning the arbitration process concerning the issue of procuring cause and the limitations of that process as not being applicable when no commission is being paid.” Witness List at 4-5.
- Mr. Whitehouse and Mr. Hardy are expected to explain how the “proposed relief will set up a system by which prospective purchasers, through promotion and advertisements paid for by Realcomp members, would essentially be placed in a position of dealing directly with homeowners who, for purposes of transaction, would akin to a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker.” Witness List at 2-4.
- Ms. Kage is expected to testify about Realcomp’s “efficiency justifications and the harm that would be caused by Complainant’s Counsel’s proposed relief.” Witness List at 1-2. Ms. Kage’s investigational hearing testimony shows that these “justifications” include the hypothetical legal dispute described above. [REDACTED]

The witnesses’ sworn deposition testimony, however, shows that none of them have

personal knowledge of any actual instance of this having occurred, and are simply offering their opinions on a hypothetical problem. In addition to being purely speculative, the testimony also clearly is based on the witnesses' views concerning the application of legal principles. None of these witnesses have been qualified as experts in this matter and none of these witnesses are even lawyers. As lay witnesses, they cannot offer opinions on legal issues. The Court should therefore issue an Order precluding any testimony at the hearing of this matter or by deposition, regarding the possible outcome of a procuring cause dispute involving a listing under an Exclusive Agency contract.³

II. ARGUMENT

A. Legal Standard

The Scheduling Order in this case specifically provides, “[w]itnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.... [and] witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed” by F.R.E. 701. Scheduling Order ¶¶ 20-21; Fed. R. Evid. 602, 701, 702. Under Rule 701, a witness not testifying as an expert may give an opinion only if it is “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. The proponent of lay opinion testimony has the burden of establishing that the testimony meets these foundational requirements. *United States v. Garcia*, 291 F.3d 127, 140

³ Attached to the accompanying Declaration of Peggy Bayer Femenella are the documents and portions of deposition testimony Complaint Counsel refers to in this memorandum.

(2d Cir. 2002).

Witnesses not designated as experts are limited to testifying to opinions which are rationally based on their own actual perception. *Indemnity Ins. Co. v. Am. Eurocopter*, 227 F.R.D. 421, 424 (D.N.C. 2005). As noted in the Advisory Committee Notes to Rule 701, “Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” Moreover, lay witnesses may not answer hypothetical questions or assume facts not in evidence in their testimony. *Teen-Ed, Inc. v. Kimball Int’l, Inc.*, 620 F.2d 399, 403-404 (3d Cir. 1980); *Hartzell Mfg. v. American Chem. Technologies*, 899 F. Supp. 405, 408 (D. Minn. 1995) (“[a] lay witness’s opinion testimony must be based upon his or her personal perceptions and, unavoidably, those perceptions must be of a type that are admissible in evidence”). Lay opinion testimony may not be based on inadmissible hearsay. *K.W. Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1273 (M.D. Al. 2001).

A. The Witnesses Lack Personal Knowledge of this Hypothetical Problem.

As non-expert witnesses, Realcomp’s witnesses must be able to testify from actual personal knowledge. *Indemnity Ins. Co.*, 227 F.R.D. at 424; F.R.E. 701; *see also* Complaint Counsel’s Memorandum in Support of Its Motion in Limine Barring Certain Lay Opinion Testimony Regarding Supposed Justifications for Realcomp’s Rules at 3-4. Ms. Kage, Mr. Taylor, Mr. Hardy, and Mr. Whitehouse, however, admitted that they have no personal knowledge of any actual procuring cause disputes involving an Exclusive Agency Listing:⁴

⁴ Not only do Realcomp’s witnesses lack any personal knowledge of any procuring cause dispute involving an Exclusive Agency agreement, Messrs. Hardy, Whitehouse, and Taylor admitted that they did not even know the reasons why the Realcomp Policies were adopted. None was a member of the Realcomp Board of Governors at the

- Ms. Kage, CEO of Realcomp, has no first hand knowledge of procuring cause issues or any issues regarding a Cooperating Broker not getting paid, because Realcomp does not directly deal with grievance and arbitration issues, and does not receive any reports or information regarding these proceedings. [REDACTED]; Kage Dep. at 37:24-38:5; CX 33 at 6 (Realcomp “does not hold hearings for procuring cause, as this is conducted at the Board or Association of Realtor’s level.”).
- Mr. Whitehouse has no first hand knowledge of any disputes or problems involving Exclusive Agency Listings:

Q. Okay. So going back in your experience, you know, prior to 2000 even, tell me of all the problems [with Exclusive Agency Listings] that you can tell me of from firsthand knowledge.

A. From first hand experiencing a problem myself?

Q. Yes.

A. I can't. I can only tell you secondhand.

Whitehouse Dep. at 111:1-111:5.

- Mr. Whitehouse, who serves on the Metropolitan Consolidated Association of Realtors arbitration committee, generally does not even know what type of listing contract is involved in a procuring cause dispute. Whitehouse Dep. at 7:12-8:16.
- All of the arbitrations involving procuring cause issues that Mr. Taylor can remember involved Exclusive Right to Sell Listings. Taylor Dep. at 111:12-111:15.

Moreover, not a single deponent in this matter could point to an arbitration that did involve an Exclusive Agency Listing. *See, e.g.*, Baczkowski Dep. at 126:24-127:17 (Listing contract type plays no role in arbitration hearings); Nowak Dep. at 19:1-19:9 (None of the NOCBOR arbitrations involved Exclusive Agency, Limited Service or MLS Entry Only Listings.); Nead Dep. at 141:6-141:19 (Listing agreement is not an issue in procuring cause disputes for WWOCAR.); Tucholski Dep. at 38:9-38:12 (DABOR has no records of procuring

time the Realcomp Policies were adopted. None had any role in the adoption of the Realcomp Policies. And none knows why the Realcomp Policies were adopted in the first place. Hardy Dep. at 100:13-100:16; Whitehouse Dep. at 105:6-105:8, 105:23-106:5; Taylor Dep. at 102:2-102:5.

cause disputes involving discount or flat fee brokers).

B. Commission Determinations Are an Issue of Contract Law.

Even if Respondent's witnesses had personal knowledge regarding commission disputes involving an Exclusive Agency Listing, the opinions they offer are based on their own views of the application of contract law. These witnesses, who have no expertise in the law, should be precluded from testifying on legal issues.

Whether or not a cooperating broker is the procuring cause of sale and entitled to the offer of compensation laid out in the Realcomp MLS, is a question of basic contract law: Was there an offer, acceptance and performance justifying compensation to the cooperating broker? The offer of compensation to a cooperating broker is clearly laid out pursuant to the rules of the Realcomp MLS, which require every listing to include an offer of compensation:

The Listing Participant shall specify, on each listing filed with the MLS, the compensation offered to MLS participants, for their services with respect to the sale/lease of the real estate covered by such listing. Such offers are unconditional except that entitlement to compensation is determined by the Cooperating Broker's performance as the procuring cause of sale (or lease) or as otherwise provided for in this rule.

CX 100 at RC1346.

Cooperating brokers accept the specified offer of compensation when they bring the buyer to the table, and the specific performance of the contract is the act of procuring the buyer for the transaction, therefore considered the procuring cause of the transaction. Procuring cause is defined as "the interplay of factors which together demonstrate that the unbroken efforts of a specific broker were responsible for the buyer making the decision to consummate the sale on terms which the seller found acceptable." CX 86 at 1; Hardy Dep. at 44:12-45:3. Basically,

procuring cause comes down to the fact that “the sale would not have occurred but for the broker’s efforts.” CX 86 at 1. So, if the cooperating broker brings in the buyer, that broker has accepted the listing broker’s offer of compensation laid out in the MLS, and has earned the stated commission by being the procuring cause of sale.

The issue of performance under the contract also involves application of established legal principles to particular facts. In Michigan, where Realcomp is located, there have been numerous cases over the last 120 years where the courts determined whether a broker was entitled to a commission.⁵ Michigan courts have frequently held that the test of a broker’s right to a commission was “whether or not he was the procuring or the producing cause of the sale...” *Advance Realty Co.*, 83 N.W.2d at 344-345; *see also Amend v. 485 Properties, LLC*, 443 F.3d 799, 800 (11th Cir. 2006) (Procuring cause must be established to collect a contractually-based commission where the broker worked on, but did not close the deal.); *Ditzik v. Schaffer Lumber Co.*, 360 N.W.2d 876, 880-81 (Mich. Ct. App. 1984); *Craib*, 6233 N.W.2d at 676-678. (In order for a real estate broker to receive a commission on a broker’s contract, he must show performance of the terms of the contract); *Hubbard*, 108 N.W. 735-736. For example, in *Ditzik*, the Michigan Court of Appeals addressed and resolved the issue of whether or not a real estate broker satisfied the performance portion of the contract and was therefore entitled to a commission regarding the sale of a lumber yard. 360 N.W.2d at 881.

⁵ See, e.g., *Craib v. Comm. on Nat’l Missions of the Presbytery of Detroit of the United Presbyterian Church*, 233 N.W.2d 674, 676-678 (Mich. Ct. App. 1975); *Advance Realty Co. v. Spanos*, 83 N.W.2d 342, 344-345 (Mich. 1957); *Hubbard, Merwin & Farmer v. Leiter*, 108 N.W. 735 (Mich. 1906).

Whether a broker is excused from obligations under the contract is also an issue of law.⁶ For example, the Sixth Circuit has addressed the very hypothetical Realcomp poses. Specifically, the Sixth Circuit has addressed the issue of whether a cooperating broker was entitled to a commission when the listing broker was not paid by the seller. *Reisenfeld & Co. v. Network Group, Inc.*, 277 F.3d 856, 859-863 (6th Cir. 2002). The Court in *Reisenfeld* held that under a quasi-contract theory, the cooperating broker was entitled to a commission from the seller even though the listing broker was not paid by the seller, and remanded the case back to the district court to determine how much of a commission the cooperating broker should receive. *Id.* at 862. This decision by the Sixth Circuit flatly contradicts the basic legal view held by the lay witnesses here – it holds that a cooperating broker was still entitled to the offer of compensation even though the listing broker was not paid.

The fact that, under Realcomp MLS Rules and Regulations, Realcomp members must first submit their procuring cause disputes for arbitration, does not change the dispute into something other than an application of legal principles. *See, e.g.*, [REDACTED]; CX 100 at 8. A Realcomp member must file a grievance or arbitration with one of the Realcomp Shareholder Boards, to address procuring cause issues.⁷ The Realcomp Shareholder Boards, who are all affiliated with the National Association of Realtors (“NAR”),⁸ are required to follow the NAR Code of Ethics and Arbitration Manual. CX 94 at NARFTC0000224-263. However, even

⁶ CX 100 at RC1346 (The listing broker’s obligation to pay the procuring cause cooperating broker the offer of compensation may be excused if it is “impossible or financially infeasible” for the listing broker to collect some or all of the commission.).

⁷ *Id.*; CX 100 at RC1344.

⁸ *See, e.g.*, [REDACTED]; Williams Dep. at 57:25 - 58:2; Baczkowski Dep. at 14:5 - 14:16.

though Realcomp members need to go through arbitration first, NAR relies on case law and state statutes to determine whether or not a broker is the procuring cause of a sale and entitled to the offered commission. *See, e.g.*, CX 86.

Under the NAR arbitration rules, “all arbitration hearings must be conducted in a manner consistent with state law.... [and it is necessary to know] case law governing arbitration and to conform the Board’s arbitration procedures to the law.” CX 94 at NARFTC0000265. Moreover, if a party refuses to abide by the arbitration award, the award recipient can seek “judicial enforcement of the award by a local court of competent jurisdiction and to request reimbursement of legal fees incurred in seeking enforcement.” *Id.* at NARFTC0000268. These arbitrations must correctly apply the law, and an arbitration award can be vacated by the courts for an “error in law.” *See, e.g., Saveski v. Tiseo Architects, Inc.*, 682 N.W.2d 542, 544 (Mich. Ct. App. 2004)(“Arbitrators exceed their power when they act ... in contravention of controlling principles of law.”); *DAIIE v. Gavin*, 331 N.W.2d 48, 55 (Mich. 1982) (If arbitrators have been lead to the wrong conclusion through an error in law, the decision will be set aside (citation omitted)).

C. No Lay Opinions Are Allowed Regarding Issues of Law.

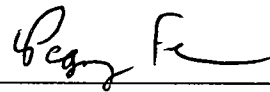
The case law is clear that lay opinion testimony should be excluded when it contains legal conclusions. *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985) (“The problem with testimony containing a legal conclusion is in conveying the witness’ unexpressed, and perhaps erroneous, legal standards....”); *FAA v. Landy*, 705 F.2d 624, 632 (2nd Cir. 1983); *see also United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980). For example, in *Baskes*, the Court held it was proper to exclude lay witness testimony “as to the legal implications of what occurred.” *Baskes*, 649 F.2d at 478; *see also United States v. Hearst*, 563 F.2d 1331, 1351 (9th

Cir. 1977) (testimony admissible because the “average layman would understand those terms and ascribe to them essentially the same meaning intended”). Numerous courts have even held expert testimony on issues of law, giving a legal conclusion or discussing the legal implications of evidence, to be inadmissible. *See, e.g., Estate of Sowell v. United States*, 198 F.3d 169, 171-72 (5th Cir. 1999); *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993).

III. CONCLUSION

These witnesses have no personal knowledge concerning any instance of a hypothetical dispute of the kind at issue. They have not been listed as experts on Respondent’s Expert Witness List, and none of these witnesses are lawyers. Their views are based on issues of law that are readily determinable without their lay views. For all these reasons, these witnesses, and any others that Realcomp tries to put forth for the same purpose, should be precluded from testifying on this proposed justification for the Policies.

Respectfully submitted,



Peggy Bayer Femenella
Complaint Counsel

May 18, 2007

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of
REALCOMP II LTD.,
a corporation.**

Docket No. 9320

Public

[PROPOSED] ORDER

On May 18, 2007 Complaint Counsel moved *in limine* to limit the trial and deposition testimony of Karen Kage, Robert Taylor, Douglas Whitehouse, Douglas Hardy, and other “fact” witnesses listed by Respondent to factual, rather than lay opinion testimony regarding certain hypothetical legal issues.

Accordingly, upon due consideration of the parties’ submissions, it is hereby

ORDERED that Karen Kage, Robert Taylor, Douglas Whitehouse, Douglas Hardy, and any other Respondent witnesses, are precluded from testifying as to lay opinions, either live or by deposition, for the justification of the Realcomp Policies regarding the possible outcome of a procuring cause dispute under an Exclusive Agency contract, or any other opinions as to which they do not have personal knowledge or are not qualified as experts in legal issues.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date:

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

DECLARATION OF PEGGY BAYER FEMENELLA

I, Peggy Bayer Femenella, make the following statement:

1. I am an Attorney in the Bureau of Competition of the Federal Trade Commission. I serve as Complaint Counsel in this matter.
2. Pursuant to Paragraph 5 of the Scheduling Order, I conferred with Steve Lasher, counsel for Realcomp on May 17, 2007, in an effort in good faith to resolve the issues raised by this Motion, and we have been unable to reach an agreement.
3. Pursuant to Pursuant to Rule 3.24(a)(2) and 3.24(a)(3) of the Commission's Rules of Practice, 16 C.F.R. §§3.24(a)(2) and 3.24(a)(3), I submit this declaration solely to bring before the Court documents and deposition transcripts relevant to Complaint Counsel's Motion in Limine and Memorandum in Support of Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues.
4. The materials submitted to the Court in the Appendix to the Memorandum in Support of Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues are true and correct copies of the following:

CX Number	Document Title	Document Date
CX 33	Respondent's Responses and Objections to Petitioner's First Set of Interrogatories and Attachments	1/11/07
CX 86	Procuring Cause Factors, National Association of Realtors Legal Affairs Article	

CX Number	Document Title	Document Date
CX 100	Realcomp II Ltd., Rules & Regulations, Revised October, 2006	10/06
Tab 1	Realcomp's Final Proposed Witness List	5/15/07
Tab 2	Deposition Transcript excerpts of Robert Taylor	3/14/07
Tab 3	Deposition Transcript excerpts of Karen Kage	02/20/07
Tab 4	REDACTED	
Tab 5	Deposition Transcript excerpts of Douglas Whitehouse	02/22/07
Tab 6	Deposition Transcript excerpts of Douglas Hardy	2/21/07
Tab 7	Deposition Transcript excerpts of Walt Baczkowski	1/29/07
Tab 8	Deposition Transcript excerpts of Martin Nowak	1/30/07
Tab 9	Deposition Transcript excerpts of Alissa Nead	1/2/07
Tab 10	Deposition Transcript excerpts of Ryan Tucholski	1/23/07
Tab 11	Realcomp's Answer to the Complaint	11/20/06
Tab 12	Deposition Transcript excerpts of Carl Williams	1/17/07
Tab 13	Excerpts from CX 94: NAR Code of Ethics and Arbitration Manual, Pages NARFTC0000222 - NARFTC0000269	2006

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on May 18, 2007.



 Peggy Bayer Femenella

CERTIFICATE OF SERVICE

This is to certify that on May 22, 2007, I caused a copy of the attached **PUBLIC VERSION** of Complaint Counsel's Motion *In Limine* Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues, the Memorandum in Support of the Motion *In Limine*, Proposed Order, a Declaration of Peggy Bayer Femenella and Exhibits, to be served upon the following persons:

by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and by electronic transmission and overnight courier to:

Scott Mandel, Esq.
Foster, Swift, Collins & Smith P.C.
313 South Washington Square
Lansing, MI 48933-2193


Stephanie M. Langley

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of:

REALCOMP II LTD.,

Docket No. 9320

Respondent.

**RESPONDENT'S RESPONSES AND OBJECTIONS TO PETITIONER'S
FIRST SET OF INTERROGATORIES**

Respondent Realcomp II Ltd. ("Realcomp"), through its attorneys, Foster, Swift, Collins & Smith, P.C., pursuant to the Federal Trade Commission Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.35, hereby responds and objects to Petitioner's First Set of Interrogatories, stating as follows:

GENERAL OBJECTIONS

Realcomp II Ltd. ("Realcomp") asserts the following general objections to each interrogatory, and each such general objection is hereby incorporated into Realcomp's response to each interrogatory as if fully set forth therein:

1. Realcomp objects to the interrogatories because and to the extent that they seek interrogatory responses that are protected from discovery under the attorney-client privilege or the work-product doctrine, or which fall within any other privilege, immunity, protection, statute, regulation, rule or restriction.
2. Realcomp objects to the interrogatories because and to the extent that they seek interrogatory responses containing confidential or proprietary information. Realcomp will only provide such interrogatory responses subject to the terms of the protective order.
3. Realcomp objects to the interrogatories because and to the extent that they are vague and ambiguous therefore requiring Realcomp, to the best of its ability, to make a subjective determination as to what interrogatory responses are being sought.
4. Realcomp objects to the interrogatories because and to the extent that they are overly broad, unduly burdensome, redundant, harassing, oppressive or seek interrogatory responses not reasonably calculated to lead to the discovery of admissible evidence, as well as to the extent it would impose an unjust burden on Realcomp to respond in the form of an excessive expenditure of time and/or money. This objection includes all interrogatories, asking Realcomp in Answers to Interrogatories to set forth "all facts," "all the reasons," "all reasons," or the like, as such matters cannot be set forth in the form of Answers to Interrogatories without undue burden and expense.

5. Realcomp objects to the interrogatories because and to the extent that they request responses that are not in the Realcomp's actual possession, custody or control.

6. No objection, response, or limitation, or lack thereof, made in these general objections or the specific responses shall be deemed: (i) an admission by Realcomp as to the existence or non-existence of any document; or (ii) a waiver of Realcomp's right to assert such objection or limitation at any future time in connection with the interrogatories or otherwise. In responding to the interrogatory, Realcomp neither waives nor intends to waive, but expressly reserves, any and all objections to relevance, competence, susceptibility to discovery, materiality or admissibility of any information provided.

7. Realcomp's responses and objections to the interrogatories are not intended to be and shall not be deemed an admission of the matters stated, implied or assumed by or in the interrogatories.

8. Realcomp objects to Petitioner's use of terminology which is not properly defined for purposes of these inquiries. Such undefined terms include, but are not limited to, active listing information, Real Estate advertising sites, unbundled services, and the like.

9. Realcomp reserves the right to supplement or modify its responses and objections to the interrogatories, if and while, it discovers any additional responsive information, or as is otherwise appropriate under applicable rules.

10. Realcomp incorporates by reference the objections it has previously filed to these interrogatories and does not waive those objections by responding to these interrogatories.

INTERROGATORIES

Interrogatory No. 1

State the number of Realcomp members (on a yearly basis) who have authorized the display of their active listing information by other Realcomp members pursuant to Realcomp's IDX Rules and Regulations.

Response:

Realcomp objects to Interrogatory No. 1 on the grounds that the inquiry is vague in that the terms "active listing information" and "IDX Rules and Regulations" are undefined.

Notwithstanding this Objection, Realcomp states that it does not document or retain activation dates for Realcomp members. Realcomp can only provide the current number of offices (and the current number of agents in those offices) that have authorized their listing data to be included in IDX. This information is reflected in the chart below, as of January 3, 2007.

1/3/2007	Authorized Data To be in IDX	Total In Realcomp	% Authorizing Data for IDX
Offices	1,028	2,395	43%
Agents	11,989	14,568	82%

Interrogatory No. 2

State the number of Realcomp members (on a yearly basis) who have participated in Realcomp's IDX through either the FTP download or framing option pursuant to Realcomp's IDX Rules and Regulations.

Response:

Realcomp objects to Interrogatory No. 2 on the grounds that the inquiry is vague in that the term "IDX Rules and Regulations" is undefined.

Notwithstanding this Objection, Realcomp states that it does not document or retain activation dates for Realcomp members. Realcomp can only provide the current number of offices (and current number of agents in those offices) that have authorized their listing data to be included in IDX. This information is reflected in the chart below, as of January 3, 2007.

1/3/2007	Number of Participating Via IDX Framing or FTP	Total In Realcomp	% Framing or FTP
Offices	369	2,395	15%
Agents	8,656	14,568	59%

Interrogatory No. 3

State the number of Realcomp members (on a yearly basis) who have authorized Realcomp to provide their active listing information to Realtor.com.

Response:

Realcomp objects to Interrogatory No. 3 as vague as to what constitutes "their active listing information to Realtor.com."

Notwithstanding this Objection, Realcomp references the Responses to Interrogatory Nos. 1 and 2. Realcomp also references the attached spreadsheet, but notes that it changed its data extraction process several years ago, and accordingly, can only provide the requested information beginning in 2002.

Interrogatory No. 4

State the number of Realcomp members (on a yearly basis) who have authorized Realcomp to provide their active listing information to MoveInMichigan.com.

Response:

Realcomp objects to Interrogatory No. 4 as vague as to what constitutes "their active listing information to MoveInMichigan.com."

Notwithstanding this Objection, Realcomp references the Responses to Interrogatory Nos. 1, and 2. Realcomp also references the attached spreadsheet, but notes that it changed its data extraction process several years ago, and accordingly, can only provide the requested information beginning in 2002.

Interrogatory No. 5

State all facts supporting Respondent's contention in its Answer that "the challenged conduct at issue in the Complaint has significant pro-competitive efficiencies that outweigh any alleged anti-competitive effects."

Response:

In summary and without limitation, the purpose of a multiple listing service is to provide a means by which authorized participants make blanket unilateral offers of compensation to other authorized participants, and a mechanism for enhancing cooperation among participants. Realcomp's primary source of income is derived from REALTOR® subscription fees, and this income is utilized to maintain and update the service.

Consumers purchasing and selling homes have a wide variety of options available to them. Sellers can list their property with a REALTOR®, and negotiate a fee for the services they select. Alternatively, they can choose from a variety of other products in the marketplace or attempt to sell the property independently without the assistance of any real estate sales assistance products or personnel. Buyers and sellers have access to numerous websites that are just as popular, if not more popular, than Realcomp's. Buyers and sellers also have access to non-electronic media such as newspapers, fliers, yard signs, and the like.

In the case of an Exclusive Agency Listing, the seller has chosen to enter into an agreement giving them the option of independently locating a buyer, with no commissions to be tendered to their listing broker (or the selling broker since there is generally no selling broker). When an Exclusive Agency listing is posted on public websites, it can be reviewed by all potential buyers. If a potential buyer independently locates a home that is an Exclusive Agency and MLS Entry Only Listing, the listing office would typically direct the potential purchaser to contact the seller directly. Once an independent buyer has contacted the seller directly, it is highly probable that if the purchase is consummated, no REALTOR® would receive commission for the sale. If the interested buyer had been working with a REALTOR® prior to independently locating the property, the buyer's agent likely would not receive any compensation after potentially investing considerable time with the buyer. This thwarts the choices available in the market to persons wishing to purchase homes as it takes away the incentive for buyer agents to work with persons interested in purchasing a home. The challenged conduct has pro-competitive efficiencies as it promotes a greater sharing of information and effort, affords buyers, including first-time and minority buyers, with more opportunities, and affords both parties in the transaction the

advantage of having professional real estate professionals with incentives to assist them in their efforts to buy and sell a house. This also avoids the result of persons being given a "free ride" by not following the Rule at issue but, nevertheless, seeking all of the promotion afforded to members who agree to follow the Rule.

Interrogatory No. 6

State all facts supporting Respondent's contention in its Answer that "Respondent lacks market power as a significant amount of sales in the described market are from persons or entities other than Respondent and there is competition in that market."

Response:

Preliminary review of available data suggests that of the total residential properties sold in Realcomp's market area, approximately 40% of the homes were listed on the Realcomp MLS. Realcomp is currently in the process of collecting and compiling data to support this contention.

Interrogatory No. 7

Identify all websites that Respondent contends allow real estate brokers in Southeast Michigan whose listings are not displayed on Realcomp Websites to effectively compete with brokers whose listing are displayed on Realcomp Websites.

Response:

Realcomp objects to Interrogatory No. 7 as overly broad, vague and unduly burdensome in that it asks Realcomp to identify "all websites" responsive to the inquiry. Realcomp further objects on the grounds that the Internet has an expansive amount of data, and it is impossible to identify all such websites.

Notwithstanding this Objection, Realcomp references the attached list of websites, which is a representative sample of the expansive amount of information requested in Interrogatory No. 7.

Interrogatory No. 8

Identify all members (past or present) of the Realcomp Board of Governors who voted against the Web Site Rule and/or Search Function Rule.

Response:

Realcomp lacks the information necessary to respond to Interrogatory No. 8, as it does not document how individual members of the Board of Governors vote on motions, nor which individuals "move for" or "second" any such motion.

Interrogatory No. 9

Identify each instance in which a Realcomp member procuring cause cooperating broker did not receive a commission on the sale of a home because the listing was an Exclusive Agency, Limited Services, or MLS Entry Only listing.

Response:

Realcomp objects to Interrogatory No. 9 on the grounds that it is unduly vague and unclear what is meant by "a Realcomp member procuring cause cooperating broker."

Notwithstanding this Objection, Realcomp states that it lacks the information necessary to respond to Interrogatory No. 9, as it does not hold hearings for procuring cause, as this is conducted at the Board or Association of REALTOR®'s level.

Interrogatory No. 10

Identify all persons involved in creating the documents submitted to the Federal Trade Commission under Commission Rule 3.31(b) regarding Initial Disclosures and describe their involvement.

Response:

Karen Kage, CEO of Realcomp, gathered and analyzed the information for the Initial Disclosures. Ken Franklin, Director of Technology for Realcomp, conducted the necessary database searches and electronic information retrieval, including statistics on the number of REALTORS® participating in IDX, REALTOR.com and MoveInMichigan.com.

Interrogatory No. 11

Describe in detail all the reasons for Realcomp's Web Site Rule.

Response:

See response to Interrogatory No. 5.

Interrogatory No. 12

Describe in detail all the reasons for Realcomp's Search Function Rule.

Response:

Prior to implementing the Search Function Rule, Realcomp received several inquiries seeking clarification on how an agent could determine the listing type for listed properties.

In many Exclusive Agency listings, the listing agent is only providing limited services to the seller. Potential sellers' agents need to understand the scope of services the listing agent is providing to the sellers prior to initiating efforts to show or sell the property. The National Association of Realtors ("NAR") Code of Ethics prohibits an agent from soliciting or working directly with a seller that is under contract with another agent, but this rule excludes any services that the listing broker is not providing to the seller. It also helped to make sure that the agents searching the databases were aware of this listing type prior to scheduling an appointment. Simply, in many of the Exclusive Agency Agreements, the listing agent is providing limited services as requested by the seller. The selling agent needs to know in advance the sellers' relationship with their agent.

Even though each entry includes a listing type, Realcomp received requests to better distinguish between the types of listings. In response, Realcomp added listing type fields to the search screen to facilitate retrieval of this information.

Realcomp also determined that nearly all of the listings in the MLS were comprised under the Exclusive Right to Sell (ERTS) or "Unknown" listing type. Since an overwhelming majority of the listings were in one of these two categories, Realcomp decided to default the search to include these two types. This helps to ensure that the agents searching the database were aware of the listing type prior to taking any action for the reasons stated above.

Interrogatory No. 13

Describe in detail all the reasons for Realcomp's rule that Exclusive Agency, Limited Services and MLS Entry Only listings will not be distributed to any Real Estate advertising sites.

Response:

Realcomp objects to Interrogatory No. 13 on the grounds that the term "Real Estate advertising sites" is undefined.

Notwithstanding this Objection, Realcomp references its response to Interrogatory No. 5. Realcomp further states that it assists its broker subscribers, that have their listings included on a Realcomp Website, by providing the broker with a feed of all of their listings so that they can include the information on any web site of their choosing. In this case, Realcomp includes all properties regardless of the listing type to ensure that the broker has access to all of his or her information.

Interrogatory No. 14

State (on a yearly basis) the number of searches conducted on the Realcomp MLS using the Listing Type default search of ERTS and Incomplete (or Unknown) listing types.

